

WESTERN NUCLEAR, INC.

IBLA 90-163

Decided January 16, 1991

Appeal from a decision of the Lander, Wyoming Resource Area Manager, Bureau of Land Management, setting rental rate for road right-of-way WYW 054837.

Affirmed.

1. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of January 21, 1895--Rights-of-Way: Appraisals

A road right-of-way issued in 1960 pursuant to the Act of Jan. 21, 1895, is subject to administration and assessment of rental pursuant to current Departmental regulations published at 43 CFR Part 2800. Assessment of increased annual rental under Departmental regulations does not require a hearing.

APPEARANCES: Daniel P. Svilar, Esq., Riverton, Wyoming, for appellant; Lowell L. Madsen, Esq., Office of Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Western Nuclear, Inc. has appealed from a November 27, 1989, decision by the Lander, Wyoming Resource Area Manager, Bureau of Land Management (BLM), setting rental for road right-of-way WYW 054837 at an increased rate pursuant to 43 CFR Subpart 2803. The November 27, 1989, decision found that an earlier rental assessment had erroneously set the rental rate while assuming that the right-of-way encompassed 23.1 acres, when 279.97 acres were actually subject to the road right-of-way. Applying the current Departmental regulation, 43 CFR 2803, BLM concluded that "the rental for 1988 was \$838.00 and rental for 1989 was \$1,199.00.

The rental for 1990 is \$1,583.00 for a total rental of \$3,620.00 due on January 1, 1990."

Complaining that no hearing under provisions of 43 U.S.C. § 1761 (1988) had been held prior to establishment of the new rental rate, which was more than double the prior annual rental rate of \$260 that had been paid annually since 1977 for the right-of-way, Western Nuclear filed an appeal from the BLM decision for the stated reason that:

43 CFR Sec. 2803.1-2 Rental (b)(1) provides that "No rental shall be collected where (i) * * * (ii) the right of way was

issued pursuant to a statute that did not or does not require the payment of rental * * *." The subject right of way was issued pursuant to "Act of: January 21, 1895 (28 Stat.635)" and that statute did not or does not require the payment of rental. Hence, no rental is due.

Right-of-way WYW 054837 issued January 13, 1960, subject to payment of rental and Departmental regulations then in effect. The location of some of the road was altered by amendment the following year. The record indicates that a fixed rental was paid for right-of-way WYW 054837 from 1965 until 1979, when the rental value of the right-of-way was reappraised. In 1987 Western Nuclear was notified that new regulations promulgated effective July 31, 1980, would be applied to compute future and current rental due. The rental assessment so made, however, contained an erroneous calculation of the right-of-way area previously described, which assumed the right-of-way comprised only 23.1 acres. The decision now under review changed the rental amount due when it corrected the area to include the total extent of the road right-of-way.

[1] Western Nuclear does not dispute that BLM correctly recomputed the acreage of right-of-way WYW 054837 nor question the accuracy of the method of computation used to find the rental rate under provision of 43 CFR 2803.1-2: the single issue on appeal concerns whether a rental may be charged for rights-of-way issued pursuant to the Act of January 21, 1895, 43 U.S.C. § 956 (1970), repealed by Pub.L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793. Prior to repeal (with a saving clause to prevent termination of existing grants) in 1976, section 956 provided, pertinently, that "[t]he Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any national park, forest, military or Indian reservation, for tramroads * * * by any citizen or association of citizens of the United States engaged in the business of mining." Regulations to implement the statutory grant of regulatory authority to the Secretary were in effect in 1960 and 1961 when this right-of-way was issued and amended. Those regulations provided that payment of rental was required for rights-of-way issued pursuant to the Act of January 21, 1895. 43 CFR 244.21 (1954).

Departmental regulations governing administration of road rights-of-way under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), including rights-of-way issued prior to October 21, 1976, were published at 45 FR 44526 (July 1, 1986). In 1986, 43 CFR 2801.4 was added to Subpart 2800 "to clarify that [Subpart 2800 is] applicable to rights-of-way granted prior to October 21, 1976, under statutory provisions repealed by the Federal Land Policy and Management Act of 1976." 51 FR 6543 (Feb. 25, 1986). The amended regulation provides:

A right-of-way grant issued on or before October 21, 1976, pursuant to then existing authority is covered by the provisions of this part unless administration under this part diminishes or

reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply.

43 CFR 2801.4.

Although Western Nuclear contends that the Act of January 21, 1895, does not require the payment of rental, the statute, quoted above, provides that the Secretary shall provide by regulation for the administration of the Act. Departmental regulations in effect at the time of the issuance of right-of-way WYW 054837 provided that rental should be paid at a fixed rate. 43 CFR 244.21(a) (1954). The right-of-way issued on January 13, 1960, provided that it was issued subject to the payment of rental, and subject to existing Departmental regulations. That obligation to pay rental was extended by 43 CFR 2801.4, which brought the right-of-way issued pursuant to the 1895 Act under the 1980 regulations at 43 CFR Part 2800 for purposes of administration.

We have applied a similar logic where a right-of-way for an electric transmission line was issued under authority of the Act of March 4, 1911. Tucson Electric Power Co., 111 IBLA 69 (1989). In Tucson Electric Power Co. we found that the regulations at 43 CFR Part 2800 were properly used in the administration of a right-of-way granted prior to enactment of FLPMA, and that application of the 1980 regulations to the 1911 Act "does not diminish or reduce the rights granted" under the earlier Act. Id. at 75. The same finding must be made here.

Western Nuclear has not directly challenged the applicability of the 1980 regulations, but instead relies on 43 CFR 2803.1-2(b)(1) for the assertion that the 1895 Act did not provide for a rental payment and therefore that none may be assessed. This logically inconsistent argument finds no support in the statute, which contains a broad grant of discretionary authority to the Secretary to regulate administration of the statute. Where those regulations have not been shown to be inconsistent with the 1895 Act, and have consistently been interpreted by the Department to require payment of rental in their administration, we must conclude that payment of rental by right-of-way grantees has been properly made part of the administration of this statute by the Secretary, and that the regulations requiring payment of rental are properly applied to this right-of-way. See American Gilsonite Co., 111 IBLA 1, 96 I.D. 408 (1989); Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985).

The assertion made on appeal that a hearing was required by 43 U.S.C. § 1761 before a rental rate could be assessed also lacks legal support. The statute relied on by Western Nuclear, 43 U.S.C. § 1761 (1988), provides for the grant or renewal of rights-of-way for roads. Neither activity is now under review in this case, where we are concerned entirely with whether a proper increase in rental was made for an existing right-of-way. The right of Western Nuclear to a correct assessment of this matter in conformity to law is protected by exercise of the right of review by this Board. See Leo Titus Sr., 89 IBLA 323, 92 I.D. 578 (1985); Woods Petroleum Co.,

86 IBLA 46 (1985). On the record presented, we conclude that the administration of this rental-rate charge by BLM was correct, no legal error having been shown.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge